LIM KHENG KIM, RE: EX P; MALAYAN BANKING BHD.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[BANKRUPTCY NO. 29(43)-500-86]
20 APRIL 1990

CIVIL PROCEDURE: *Setting off or stay - Judgment debt - Solicitor's lien - Discretion of Court - Order 59 rr. 3, 16(a) Rules of the High Court 1980.*

The judgment debtor, LKK, was declared a bankrupt on 20 June 1988. On a technicality his appeal to the Supreme Court was allowed with costs. His solicitors taxed the bill of costs. The bank, as judgment creditor, served a fresh bankruptcy notice which was set down for hearing on 8 May 1990. On 12 February 1990, LKK's solicitors served the bank with an allocatur for the taxed costs. The bank hence applied for setting off of the costs against the judgment debt or alternatively for a stay of execution. The primary issue for determination was whether the Court has a discretion to allow a set off of the debtor's taxed costs against his judgment debt.

Held:

[1] The general rule is that the award of costs shall always be at the discretion of the Court - see O. 59 r. 3 of Rules of the High Court 1980. The power of the Registrar to set off costs against costs is provided in O. 59 r. 16(a) of Rules of the High Court 1980.

[2] The Court has a discretion to allow a set-off when just, notwithstanding a solicitor's lien. *Re A Debtor* (No. 2 of 1950) [1951] 1 All ER 600 followed and applied.

[Set-off granted of the debtor's taxed costs against the judgment debt]

[Editor's Note: The judgment debtor has lodged an appeal to the Supreme Court.]

Cases referred to:
David v. Rees & Ors. [1904] 2 KB 435
Reid v. Cupper [1915] 2 KB 147
Re Chong Fong Chen [1932] MLJ 140
Re Letchumanan Chetty [1936] MLJ 280
Re A Debtor (No. 21 of 1950) [1951] 1 All ER 600

Legislation referred to:
Legal Profession Act 1976, s. 116
Rules of the High Court 1980, O. 59 rr. 3, 16(a)

Other sources referred to:
Mallal's Supreme Court Practice, 2nd Edn., p. 773

For the judgment creditors - Toh Lee Hong; M/s. Lim Huck Aik & Co.
For the judgment debtor - Tan Beng Hong with Ooi Teik Hoe; M/s. Ooi, Lee & Co.

JUDGMENT

Mohamed Dzaiddin J:

This is an application for setting-off of costs against a judgment debt, or alternatively for a stay of execution for the payment of taxed costs. The primary issue for determination in this summons in chambers is whether the Court has a discretion to allow a set-off of the debtor's taxed costs against his judgment debt.

The Facts

The judgment debtor was truly indebted to Malayan Banking Berhad in the sum of RM2,603,913.28 under a judgment obtained against him on 25 January 1986. Upon failing to settle the said debt the bank proceeded with a bankruptcy action against him in 1986 and was duly adjudicated a bankrupt by order of this Court dated 20 June 1988. He appealed against the said order which was allowed by the Supreme Court on a technicality. He was also given costs which his solicitors had proceeded to tax the bill of costs. In the meantime, the bank served a fresh bankruptcy notice on the debtor demanding payment of the judgment debt of RM2,603,913.28. This was followed by a creditor's petition filed in June 1989, which came up for hearing on 3 January 1990 which had adjourned to 8 May 1990. On 12 February 1990 the debtor's solicitors served the bank with an allocatur for RM14,576 being the taxed costs and threatened to levy execution.

Cik Toh, for the bank submitted that the Court in the exercise of its powers could grant a stay of execution or allow a set-off of the taxed costs of RM14,576 against the judgment debt of RM2,603,913.28 as the debt owed to the bank is far in excess of the taxed costs.

Encik Tan Beng Hong, on the other hand, contended that the sum of RM14,576 as taxed costs actually belonged to the solicitors by virtue of an agreement between the judgment debtor and the solicitors dated 2 November 1986 made under s. 116 of the Legal Profession Act 1976. This section permits an advocate and solicitor to enter into a written agreement with the client regarding the amount and manner of payment for his costs in respect of contentious business done by such advocate and solicitor. Encik Tan stated that as this is a solicitor's lien, it cannot be set-off against the debtor's debt.

The Law

The general rule is that the award of costs shall always be at the discretion of the Court. Under O. 59 r. 3 Rules of the High Court, it is stipulated that subject to the provisions of this order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of Court. The power of the Registrar to set-off costs against costs is provided in r. 16(a) of O. 56 Rules of the High Court. The rule states:

> 16. Where a party entitled to be paid costs is also liable to pay costs, the Registrar may:
>
> (a) tax the costs which that party is liable to pay and set off the amount allowed against the amount he is entitled to be paid and direct payment of any balance;

From the cases cited in *Mallal's Supreme Court Practice*, 2nd Edn., at p. 773, one may notice that there are three principles to bear in mind. First, the provisions with regard to set-off of costs between parties are confined to cases in which the costs sought to be set-off against each other are in the same action or proceeding: *David v. Rees & Ors.* [1904] 2 KB 435. Secondly, this rule gives the Court a discretion to allow a set-off: *Reid v. Cupper* [1915] 2 KB 147. Thirdly, the English rule that there can be no set-off of costs in bankruptcy proceedings does not apply in our Courts: *Re Chong Fong Chen* [1932] MLJ 140, which was followed in *Re Letchumanan Chetty* [1936] MLJ 280.

However, on the issue before me, the case of *Re A Debtor (No. 21 of 1950)* [1951] 1 All ER 600 seems to settle the matter beyond any doubt. In that case, the English Divisional Court had held that the Court had a discretion to allow a set-off when just, notwithstanding a solicitor's lien. The facts, as taken from the headnote were these. A balance of £409 of a

judgment debt not having been paid, the judgment creditors obtained a receiving order against the debtor, but, on an appeal by the debtor to the Divisional Court in Bankruptcy, the order was set aside for technical reasons and the creditors were ordered to pay to the debtor the costs of the appeal and of the proceedings in the county Court, which amounted to about £72. The debtor having threatened to levy execution against the creditors in respect of this sum, the creditors applied to the Court for a stay of execution of the order for costs. The application was resisted by the debtor on the ground that to grant a stay would be equivalent to allowing a set-off to be made, and that (a) a set-off would interfere with the lien of the debtor's solicitor and (b) the judgment creditors would be obtaining payment in full in priority to other possible creditors. Both Harman and Danckwerts JJ went on to discuss at length some of the English cases mentioned in *Mallal' Supreme Court Practice*, 2nd Edn. at p. 773 with particular reference to the question of a set-off of a solicitor's lien. Perhaps, it is appropriate that I quote the judgment of Harman J, at p. 695:

> I agree, therefore, with Danckwerts J, in thinking that we have a discretion to allow this set-off, or a stay, which amounts to much the same thing, if it be just. In my opinion, it would be right to allow it. I cannot see that as between the parties themselves there can be any justice in allowing the debtor to levy execution against the goods of his creditors, nor do I think that this ought to be allowed for the sake of the debtor's solicitor. I cannot see any reason why the creditors should pay the costs of the debtor's solicitor if the debtor is unable to do so, nor do I believe that a solicitor accepting the retainer of a person against whom bankruptcy proceedings are pending does so in reliance on the view that the petitioner's solicitor may blunder and thus give him the advantage of an order for costs against the petitioner. Therefore, we propose to grant the stay which is asked for.

I would adopt fully the decision of the Court of Appeal to the present case. Hence, in the exercise of my unfettered discretion, I find it just to grant a set-off of the debtor's taxed costs of RM14,576 against the judgment debt of a much substantial sum of RM2,603,913.28 notwithstanding the defendant's solicitor's lien.

Application allowed with costs.

Also found at [1990] 2 CLJ 682